FILED BY CLERK
JUL 25 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. IGNACIO GARCIA, Appellant.	)	2 CA-CR 2007-0227 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20060481

Honorable Robert Duber, II, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

Emily Danies
Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 A jury found appellant Ignacio Garcia guilty of possession of a dangerous drug for sale and possession of drug paraphernalia. On appeal, Garcia argues the trial court erred when it denied his motion to suppress both evidence found in a motel room and incriminating statements he made to police, which he asserts were the fruits of his illegal detention. He also contends the court erred by denying his counsel's motion to withdraw before trial without conducting any further inquiry into the underlying facts. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 In reviewing a trial court's decision on a motion to suppress, we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings. *In re Ilono H.*, 210 Ariz. 473, ¶ 2, 113 P.3d 696, 697 (App. 2005). On September 14, 2006, Globe police officers Williams and Zamora were dispatched to a motel in response to a call from the motel manager reporting disorderly conduct and possible drug activity in and around room 105. After knocking on the door of that room and announcing they were police officers, Garcia eventually opened the door, and the officers asked him to step outside. In response to questioning, he told the officers there was someone else in the room, and Officer Williams went in and brought out a woman, Amy Bradford, who appeared upset.

¶3 While Officer Williams questioned Garcia and Officer Zamora questioned Bradford outside the room, a third officer who had arrived, Sergeant Kinnard, went to the

motel office where he spoke to the manager and a maintenance worker. They told him room 105 had been rented by a Michael Falquez and there had been a lot of people coming to the room, staying only briefly, and then leaving. They also gave him a small plastic bag, found outside the room, that contained a white pill and a powdery substance. When Kinnard returned to the motel room less than ten minutes later, Williams asked Garcia if the officers could search it, and Garcia consented. Items found during the search included a digital scale and ten small packages of methamphetamine. Williams then arrested Garcia and drove him to the Globe police station. After being read the *Miranda* warnings,[1] Garcia consented to a tape-recorded interview.

¶4 At a suppression hearing seven weeks before trial, the trial court found that, "based on the citizen complaint and report," the police had reason to be at the location and had "a reasonable suspicion of criminal behavior." It further found Garcia had voluntarily consented to the search and his subsequent statements were "knowing, intelligent, and voluntarily made." The court denied Garcia's motion to suppress the physical evidence found as a result of the search and his later recorded statements.

¶5 On the same day as the suppression hearing, at which Garcia did not appear, his counsel, Robert Standage, filed a motion to withdraw as counsel of record, stating "[t]he working relationship between counsel and [Garcia] ha[d] become unworkable." Specifically, Standage alleged Garcia had "not cooperated in responding to counsel's

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

telephone calls and other requests, . . . not kept appointments in order to aid counsel in the preparation of his defense, and . . . not paid his legal fees as set out in the contract for services." The trial court summarily denied the motion.

¶6 After a jury trial, Garcia was convicted of possessing a dangerous drug for sale and possessing drug paraphernalia. The court sentenced him to a six-year prison term for the possession-for-sale conviction and to a consecutive, mitigated, nine-month term for the paraphernalia conviction. This appeal followed; we have jurisdiction under A.R.S. § 13-4033(A).

Discussion

Motion to suppress

¶7 Garcia first argues the court erred in denying his motion to suppress both the evidence found in the search of the motel room and his subsequent recorded statements. He asserts the police officers lacked reasonable suspicion to continue to detain him after they had initially questioned him and "discovered no disorderly conduct had occurred."[2] Thus, he contends the fruits of the search and his subsequent statements should have been

[2]Garcia specifically contends the police investigation was finished after he "was patted down and nothing found on him, and Ms. Bradford was patted down and nothing found on her." But, it is somewhat unclear when those pat-down searches actually occurred. Although Officer Zamora testified that Sergeant Kinnard patted Garcia down "for officer safety" after Garcia had stepped out of the motel room and before the officers started talking to him, Kinnard denied patting down Garcia. Officer Williams testified he had patted down Garcia and Bradford, but only after the officers had searched the motel room and found the drugs and paraphernalia.

suppressed because they were tainted by his prolonged detention in violation of the Fourth Amendment.[3] *See* U.S. Const. amend. IV; *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963) (evidence obtained directly or indirectly by violation of Fourth Amendment not admissible against victim of illegal search or seizure). In reviewing a trial court's ruling on a motion to suppress, "we defer to the trial court's factual findings, . . . but we review de novo mixed questions of law and fact and the trial court's ultimate legal conclusions as to whether the totality of the circumstances warranted an investigative detention and whether its duration was reasonable." *State v. Teagle*, 217 Ariz. 17, ¶ 19, 170 P.3d 266, 271 (App. 2007).

¶8 A limited investigatory stop "'is permissible under the Fourth Amendment if supported by reasonable suspicion' that criminal activity is afoot." *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996), *quoting Ornelas v. United States*, 517 U.S. 690, 693 (1996); *see Terry v. Ohio*, 392 U.S. 1, 30 (1968). A citizen's report of unusual activity is sufficient to give rise to such reasonable suspicion. *State v. Gomez*, 198 Ariz. 61, ¶ 19, 6 P.3d 765, 768 (App. 2000); *State v. Houlf*, 27 Ariz. App. 633, 636, 557 P.2d 565, 568 (1976); *see also State v. Dixon*, 24 Ariz. App. 303, 305, 537 P.2d 1361, 1363 (1975) (*Terry* stop justified when police saw defendant coming out of motel room where motel manager reported disturbance had occurred).

---

[3]Garcia does not allege his consent was involuntary, which is "an entirely separate question from whether a consent to search is tainted by a prior Fourth Amendment violation." *United States v. Washington*, 387 F.3d 1060, 1072 n.12 (9th Cir. 2004).

¶9 In the course of an investigatory stop, officers may detain a suspect, using reasonable force, while they gather more information about a reported crime. *State v. Aguirre*, 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App. 1981). In determining whether the duration of a stop is reasonable, we consider "'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.'" *Teagle*, 217 Ariz. 17, ¶ 32, 170 P.3d at 275, *quoting United States v. Sharpe*, 470 U.S. 675, 686 (1985).

¶10 Garcia relies on *United States v. Washington*, 387 F.3d 1060 (9th Cir. 2004), to support his claim that his Fourth Amendment rights were violated by the investigatory stop. However, contrary to Garcia's assertion, *Washington* did not involve an encounter at a motel but at the defendant's home in a hotel that had been converted into residential apartments. 387 F.3d at 1063. As the Ninth Circuit noted in that case, the United States Supreme Court "has never expanded *Terry* to allow a *Terry*-stop at an individual's home." *Id.* at 1067. "[Although o]fficers on the beat may lose a suspect before [they] have gathered enough information to have probable cause for an arrest[,] . . . officers who know where a suspect lives have the opportunity to investigate until they develop probable cause, all the while knowing where to find the suspect."[4] *Id.*

[4]We note it is questionable whether Garcia's Fourth Amendment rights were implicated by the search of a motel room not registered in his name. *See State v. Berryman*, 178 Ariz. 617, 623, 875 P.2d 850, 856 (App. 1994) (no standing to challenge search of motel room registered in the name of another). The parties do not raise this issue, and we therefore do not consider it.

¶11 In the present case, the motel manager called police to report disorderly conduct and possible drug activity in the room occupied by Garcia and Bradford. The first two officers therefore had reasonable suspicion to detain and question Garcia and Bradford outside the motel room while another questioned the manager in the motel office. *See Aguirre*, 130 Ariz. at 56, 633 P.2d at 1049. Garcia provides no support for his assertion that "the police were finished with their investigation" once they had patted down Garcia and Bradford and had found no contraband. Nothing in the record indicates that this detention, which lasted less than ten minutes, was unreasonably long under the circumstances.[5] *See Teagle*, 217 Ariz. 17, ¶ 31, 170 P.3d at 274, *quoting United States v. Place*, 462 U.S. 696, 709-10 (1983) ("declining to 'adopt any outside time limitation for a permissible *Terry* stop' and instead focusing the inquiry on whether 'police diligently pursue[d] their investigation'"). Because Garcia's Fourth Amendment rights were not violated, we conclude the trial court properly denied his motion to suppress.

Motion to withdraw

¶12 Garcia next argues the court erred in denying his counsel's motion to withdraw without holding a hearing or questioning Garcia about the facts alleged in the motion. "We

[5]We note that Garcia's detention was considerably shorter than that approved in *State v. Teagle*, 217 Ariz. 17, ¶ 30, 170 P.3d 266, 274 (App. 2007), in which the defendant was detained for an hour and forty minutes while awaiting the arrival of a drug-detection dog, and less coercive than that approved in *State v. Aguirre*, 130 Ariz. 54, 56, 633 P.2d 1047, 1049 (App. 1981), in which the defendant was handcuffed and placed in a patrol car.

will overturn a trial court's decision on a motion to withdraw only if the trial court abused its discretion." *State v. Jones*, 185 Ariz. 471, 482, 917 P.2d 200, 211 (1996).

¶13 As a threshold issue, the state asserts that "a trial court's order denying counsel's motion to withdraw is not appealable but, rather, must be challenged by a special action before trial." We disagree. Although before trial such a ruling is not appealable as a final order and may be challenged by special action, *see Riley, Hoggatt & Suagee, P.C. v. Riley*, 165 Ariz. 138, 138, 796 P.2d 940, 940 (App. 1990), no authority directly supports the state's contention that the trial court's denial of a motion to withdraw may not be raised by a defendant on appeal after a final judgment of conviction. Indeed, on at least two occasions our supreme court has accepted appellate review of such an issue. *See Jones*, 185 Ariz. at 482, 917 P.2d at 211; *State v. Bush*, 108 Ariz. 148, 493 P.2d 1205 (1972).

¶14 Our courts generally have found an abuse of discretion when a trial court denied a motion to withdraw after counsel had established "an ethical conflict requiring withdrawal," *Maricopa County Pub. Defender's Office v. Superior Court*, 187 Ariz. 162, 167, 927 P.2d 822, 827 (App. 1996); *see also Bush*, 108 Ariz. at 151, 493 P.2d at 1208 (finding "clear showing of a conflict" of interest); *Okeani v. Superior Court*, 178 Ariz. 180, 182, 871 P.2d 727, 729 (App. 1993) (finding counsel's "continued representation of defendant would have resulted in a violation of the ethical rules"). And, where a trial court denied a motion to withdraw filed before the trial date had been set, we found an abuse of discretion when the motion was based on less compelling reasons and the defendant would

not have been prejudiced by the withdrawal. *See Riley, Hoggatt & Suagee, P.C.*, 165 Ariz. at 140, 796 P.2d at 942 (nonpayment of fees).

¶15 However, "[c]ounsel's burden of persuasion might be expected to rise as the case approaches trial." *Maricopa County Pub. Defender's Office*, 187 Ariz. at 167, 927 P.2d at 827. Furthermore, pursuant to Rule 6.3(c), Ariz. R. Crim. P., a motion to withdraw after a case has been set for trial must be "accompanied by the name and address of another attorney, together with a signed statement by the substituting attorney that he is advised of the trial date and will be prepared for trial."

¶16 Garcia's counsel filed a motion to withdraw two weeks after the trial date had been set and seven weeks before the date set for trial. The motion cited Garcia's failure to respond to telephone calls and keep appointments as well as his failure to pay legal fees. However, counsel did not suggest that his continued representation of Garcia was barred by any conflict of interest or ethical violation. Furthermore, the motion to withdraw was not accompanied by the name, address, or statement of a substituting attorney as required by Rule 6.3(c). The court did not abuse its discretion in denying the motion, given its timing, the reasons counsel proffered for withdrawal, and counsel's noncompliance with Rule 6.3(c).

¶17 Nor are we persuaded by Garcia's argument that the trial court erred in denying the motion without inquiring into the underlying facts. His reliance on *State v. Torres*, 208 Ariz. 340, 93 P.3d 1056 (2004), for this proposition is misplaced. In *Torres*,

our supreme court held the trial court abused its discretion by failing to inquire into a defendant's request for substitution of counsel, where the defendant had raised "a colorable claim that he had an irreconcilable conflict with his . . . counsel." 208 Ariz. 340, ¶ 9, 93 P.3d at 343. Torres claimed "he could no longer speak with his lawyer about the case, he did not trust him, he felt threatened and intimidated by him, there was no confidentiality between them, and his counsel was no longer behaving in a professional manner." *Id.* ¶ 2. But here, not only did the facts alleged in the motion to withdraw fall short of suggesting an irreconcilable conflict, they were asserted by counsel, not by the defendant. Garcia did not file a motion to substitute counsel that might have required further inquiry by the court; indeed, there is no indication in the record that Garcia communicated any dissatisfaction with his counsel.[6] *See State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 16, 154 P.3d 1046, 1052 (App. 2007) (*Torres* requirement that court make inquiry applies when defendant seeks new counsel; distinguishing counsel's motion to withdraw).

¶18 To the extent Garcia argues the court's failure to make such an inquiry deprived him of his Sixth Amendment right to counsel, we note that a defendant's constitutional right to counsel is fulfilled when a qualified member of the state bar acts diligently on the defendant's behalf. *State v. Schaaf*, 169 Ariz. 323, 330, 819 P.2d 909,

[6]Although Garcia's counsel informed the court at a subsequent status hearing that Garcia was "looking for another attorney," the record affords no further details. The trial court apparently did not construe this statement as a motion to substitute counsel, and Garcia does not argue on appeal that we should do so.

916 (1991). To the extent Garcia suggests denying his counsel's motion to withdraw resulted in ineffective assistance of counsel, Garcia must make such an argument in a proceeding for post-conviction relief. *See Jones*, 185 Ariz. at 482, 917 P.2d at 211; *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) ("[I]neffective assistance of counsel claims are to be brought in Rule 32 proceedings.").

Disposition

¶19 For the reasons stated above, we affirm Garcia's convictions and sentences.

_____

GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____

PETER J. ECKERSTROM, Presiding Judge

_____

PHILIP G. ESPINOSA, Judge